In The
Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
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No. 71-591

BETTY B. RAWLS,

Petitioner,

vs.

THE CONDÉ NAST PUBLICATIONS, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

I.

The decision and judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed (446 F.2d 313) is in conflict with the decision of the Court of Appeals for the Ninth Circuit in Dietemann v. Time, Inc. (9th Cir. 1971), 449 F.2d. 245, reported subsequent to the filing of the petition for writ of certiorari.

In the instant case respondent's agents entered petitioner's home without her consent while she was absent, took pictures in petitioner's home, and subsequently published one of those

pictures over petitioner's objections. The jury found for petitioner on Count Two which complained of the unauthorized intrusion and the publication of the photograph obtained through that intrusion, awarding petitioner compensatory and punitive damages. The District Judge entered judgment for petitioner on the jury's verdict and denied respondent's motion for judgment notwithstanding verdict. The Court of Appeals for the Fifth Circuit reversed the judgment for petitioner, specifically rejecting as "unsound" petitioner's efforts

> ". . . to uphold the verdict for damages under Count Two by urging that the earlier *physical intrusion* (realleged in Count Two) made it unnecessary for publicity to be present or for identification to be possible to allow recovery . . . . The argument appears to be that Count Two was some sort of hybrid count involving *both* unlawful physical intrusion (or trespass) *and* invasion of privacy by publication of the picture."
>
> (446 F.2d at 319; App. 21-22).

In *Dietemann* v. *Time, Inc.* (9th Cir. 1971), 449 F.2d 245, defendant's agents gained entrance to plaintiff's home by subterfuge and took photographs and recordings with hidden equipment. In affirming the award of damages for invasion of plaintiff's privacy, the Court held that

> ". . . publication is not an essential element of plaintiff's cause of action"
>
> (449 F.2d at 249)

but further held that the subsequent publication of information acquired by the intrusion enhances the compensable damages, saying:

> "No interest protected by the First Amendment is adversely affected by permitting damages for intrusion

> to be enhanced by the fact of later publication of the information that the publisher improperly acquired. Assessing damages for the additional emotional distress suffered by a plaintiff when the wrongfully acquired data are purveyed to the multitude chills intrusive acts. It does not chill freedom of expression guaranteed by the First Amendment. A rule forbidding the use of publication as an ingredient of damages would deny to the injured plaintiff recovery for real harm done to him without any countervailing benefit to the legitimate interest of the public in being informed. The same rule would encourage conduct by news media that grossly offends ordinary men."
>
> (449 F.2d at 250).

The decisions are in direct conflict. The decision of the Ninth Circuit correctly applies the law of invasion of privacy to uphold the sanctity of the home and to chill intrusive acts; the decision of the Fifth Circuit deprecates the law of invasion of privacy, thereby sacrificing the sanctity of the home and encouraging conduct "that grossly offends ordinary men."

Because the conflicting decision of the Ninth Circuit was reported subsequent to the filing of the petition for writ of certiorari, the Court should grant a rehearing and should vacate its order denying the petition.

II.

The decision sought to be reviewed so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The proceedings in the instant case have produced a result that is unjust, and only this Court has the power to right

this judicial wrong. The series of events which have brought petitioner, an innocent victim of respondent's wrongful acts, to the point of financial ruin as respondent's judgment debtor, may be simply stated:

(a) The evidence shows, without dispute, that respondent's agents entered petitioner's home without her consent or prior knowledge while petitioner was absent from her home and while her home was in the care of her minor children.

(b) The entry into petitioner's home was made by respondent's agents deliberately and with knowledge that petitioner had not consented thereto, for the purpose of using petitioner's home to further respondent's business by producing advertising income.

(c) When petitioner returned to her home to find respondent's agents, she did not attempt to forcefully eject them but (according to the disputed evidence most favorable to respondent) acquiesced to respondent's agents' request "to remain on the premises and complete the picture taking under the existing light conditions" (446 F.2d at 315; App. 12), upon being assured by respondent's agents that they would soon be through and would then leave her home.

(d) Under Florida law the entry by respondent's agents of petitioner's home without her consent was an actionable tort entitling petitioner to at least nominal damages. [*Leonard* v. *Nat Harrison Associates, Inc.* (Fla. App. 2d Dist. 1960), 122 So.2d 432, 433; *Kelliher* v. *Stone & Webster, Inc.* (5th Cir. 1935), 75 F.2d 331, 333.]

(e) Petitioner filed suit in the state court of Florida to enforce the claim for damages which she had against respondent under the law of Florida.

(f) Respondent removed petitioner's case to the United States District Court because of diversity of citizenship.

(g) The case was tried before a jury which awarded petitioner $5,000 in compensatory damages and $50,000 in punitive damages on Count Two and found for the respondent on Count One.

(h) The trial judge entered judgment on the jury's verdict.

(i) The Court of Appeals held that the trial judge erred in instructing the jury that subsequent consent would bar petitioner from recovering damages from the wrongful intrusion alleged in Count One because "the defendant may avail itself of the defense of consent only if the consent existed at the time the intrusion took place" (446 F.2d at 316; App. 16), but then arbitrarily held that "the error was technical only, and not harmful." (446 F.2d at 317; App. 17-18), and affirmed the judgment on the jury's verdict for respondent as to Count One.

(j) The Court of Appeals then reversed the judgment entered for petitioner as to Count Two, upon the predicate that the jury's finding for respondent as to Count One (resulting from the "technically erroneous" charge) was a specific finding that there was no wrongful intrusion as alleged in Count Two.

(k) The Court of Appeals denied petitioner's petition for rehearing which requested that the case be remanded for a new trial by jury correctly instructed as to the law as pronounced by the Court of Appeals' decision.

(l) The Court of Appeals denied petitioner's objections to respondent's cost bill for $4,460.28 in appellate costs.

Thus petitioner, who was legally wronged by respondent, who, under the applicable Florida law, was entitled to a judgment against respondent for at least nominal damages under the law of the State of Florida, and who obtained a jury verdict awarding her compensatory and punitive damages, now finds herself a judgment debtor in the amount of $4,460.28 to the tort-feasor who began it all by wilfully entering her home without her consent. Such distorted justice cries out for correction by this Court.

CONCLUSION

For reasons set forth herein, as well as those set forth in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the petitioner I hereby certify that this petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58(2).

C. Harris Dittmar